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Editorial

In this issue, we continue our digital and data theme for 2017 with a look at data regulation, security and surveillance.

With an article from the UK's very own Sir Julian King, the EU Commissioner for the Security Union, on online radicalisation, as well a review of the EU's new data economy package and the EU's actions to counter 'fake news', we see that the EU is acting quickly in response to the new opportunities and challenges arising in the

continually developing 'Digital Age'. We also have articles from Sir Michael Burton, President of the UK's Investigatory Powers Tribunal, and Dr Nathalie Moreno, an experienced commercial technology lawyer, on surveillance and its impact on citizens. Finally, Peter Wright, the founder of DigitalLawUK Ltd and Chair of the Law Society of England and Wales' Technology & Law Reference Group discusses the Computers, Privacy & Data Protection Conference 2017.

The last month has also brought further developments relating to the UK's vote to leave the EU: the judgement by the Supreme Court that an Act of Parliament must be passed to trigger Article 50 and the unveiling of the UK government's Brexit plan in Theresa May's speech on 17 January and its white paper, entitled 'The United Kingdom's exit from and new partnership with the European Union', have brought a bit more clarity but also more questions regarding Brexit. We are fortunate to have an article from Rob Murray, a partner in Mishcon De Reya's Dispute Resolution department, who acted for the lead claimant, Gina Miller, in the Article 50 case to explain the judgement.

In addition, you will see our usual update on the latest EU policy developments, politics and case law. In particular, we discuss the Commission's new services package, the EU's work on robotics, the election of the President of the European Parliament, Antonio Tajani, of the centre-right European People's Party (EPP), and much more.

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Commissioner King The challenges of online radicalisation

Tackling terrorists' use of the internet is central to our work to defeat terrorism. It's a real challenge as we experienced in 2016 when witnessed time and again how terrorists have exploited the internet to pursue and promote their objectives. Propaganda videos, instructions on how to conduct terror attacks and calls for attacks in the West using "all available means" have all featured heavily online. The aim of this material is to radicalise, recruit, encourage and direct terrorist activity and instil fear amongst our citizens.

Da'esh is often considered the most prolific user of the internet, although their output in recent months has decreased. Nevertheless, we should expect them to seek to maintain their online presence as they attempt to compensate for their physical decline on the ground. In this vein, and for as long as their propaganda is able to circulate and multiply online, the internet will continue to provide a lifeline to *Da'esh*, long after it is rolled back on the ground.

We should also not ignore those other terrorist groups who operate online such as Al Qaeda, Jabhat Fateh-al Sham, Boko Haram, as well as a worrying rise of violent right-wing extremists. They learn from each other and adapt their online behaviour accordingly. Whilst their ideologies differ, they are united in their intent to sow division and radicalise, preying on those who feel disadvantaged and marginalised within society.

Tackling radicalisation remains at the forefront of our counter terrorism response. A long-term, concerted and collaborative effort is required, and to be successful it needs to include all actors: internet service providers, governments, law enforcement authorities as well as civil society organisations. The EU Internet Forum set up in 2015 by the Commission strives to do just that, bringing the relevant stakeholders together to discuss the challenges and agree a collaborative way forward. Academic researchers also keep Forum Members up to speed as to how terrorist behaviour is evolving online.

Over the course of the last year, substantial progress has been made in reducing accessibility to terrorist content online. The Internet Referral Unit at Europol is doing an excellent job in scanning for terrorist material in the public domain and then referring it to the relevant platform, where it is assessed against the company's terms and conditions. Over 90% of pages referred are taken down. We also welcome the so called "database of hashes" initiative developed by some of the large companies to prevent material which has been removed from one site popping back up on another. We now need more companies to get involved and deepen that cooperation further.

Despite these efforts, there is still much more that we need to do to protect online users from harmful content – particularly the young and the vulnerable. For example, we need to see what can be done to enable online users to be better able to distinguish fact from propaganda.

More generally, we need to do more to prevent and deter others from venturing down the route which leads to violent extremism. It is civil society partners rather than governments who are best placed to deliver such

messages – not least because disaffection with the 'system' seems to be a recurring theme amongst those who have become radicalised. But those who do have the 'credible voice', often lack the resources or the technical know-how to be able to deliver effective campaigns online. That is why we have a programme of work underway to empower civil society partners to do just that, and we have committed €10 million to support this effort.

There has never been a more critical time for us to focus our joint efforts and resources on tackling this online phenomenon. The EU Internet Forum has demonstrated that a private-public voluntary approach, based on human rights, shared values, and a joint determination to protect EU online users, can work. The scale of this challenge is indeed immense and we must ensure that our online efforts go hand-in-hand with our offline efforts to counter violent extremism and prevent further atrocities.

Biography



Sir Julian King was appointed Commissioner for Security Union on the 19th September 2016.

He joined the Foreign & Commonwealth Office in 1985. He has held various positions, including: UK Ambassador to France (2016); Director General Economic & Consular (2014); DG of the Northern Ireland Office London and Belfast (2011); UK Ambassador to Ireland (2009); EU Commission Chef de Cabinet to Commissioner for Trade (2008); UK Representative on EU Political and Security Committee, (2004).

Sir Julian is a graduate of Oxford University. He was awarded the KCVO in 2014; CVO in 2011 and CMG in 2006.

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In Focus

DATA REGULATION, SECURITY AND SURVEILLANCE

Sir Michael Burton

Mass surveillance and the Investigatory Powers Tribunal

Sir Michael Burton, President of the Investigatory Powers Tribunal, shares his experience and views on the role of judiciary in overseeing the intelligence activities of the State. The article is part of his contribution to the Law Societies' Brussels Office [panel discussion on mass surveillance](#) during the [Computers, Privacy and Data Protection conference](#) on 27 January.

I have been asked to explain the UK's judicial system in this area. The Investigatory Powers Tribunal was founded in 2000 by the amalgamation of 3 previous Tribunals. I have been Vice-President since the beginning and President since 2013. There are normally 10 members including the President and Vice-President, being the "great and the good", High Court Judges, and senior QCs, retired judges and senior Solicitors from all 4 jurisdictions of the UK. Its statutory basis is found in ss 65-69 of the Regulation of Investigatory Powers Act 2000 (RIPA).

Complaints can be made to the Tribunal by members of the public and NGOs about interception and surveillance by the police or other public authorities, or about any conduct by the Security Agencies. We have the power to investigate those complaints and to require disclosure of all or any documents or information by respondents to the Tribunal and to hold hearings both public and, where necessary in the interests of national security, in private. Our life has changed since Snowden, when the bringing of claims by NGOs increased substantially based upon his leaks.

Of the individual claims made, some require to be investigated, although many fall within the class of "frivolous and vexatious"; and most which are investigated can be resolved fairly easily. The possible results are a finding that (1) the conduct complained of never happened or (2) it did happen but it was lawful and proportionate, taking into account UK domestic law and the ECHR or (3) it did happen and was not lawful or not proportionate. In the latter case a determination will be made in the complainant's favour and full reasons will normally be given. If – the substantial majority of cases – the result is one of the first two then the Tribunal is only entitled to say that it has made no determination in favour of the claimant – to comply with NCND (Neither Confirm Nor Deny): if in some cases allegations of interception etc. are denied, then it will be

assumed in other cases that in the absence of such denial the conduct is taking place, but lawfully.

Particularly in cases brought by NGOs it has now become the practice of the Tribunal to hold open hearings, with full open argument, with eminent counsel expert in Human Rights law appearing before us. We are no longer "Britain's most secret court". We have developed a procedure in national security cases of assuming the facts in favour of the claimant. A claimant (including an NGO) is entitled to bring a claim without proof of what he alleges, simply on the basis of reasonable suspicion, and the facts are assumed in his favour, and the Tribunal then considers whether on those assumptions the conduct complained of is lawful. This gives us a considerable advantage over the statutory Commissioners and the Parliamentary Committee (ISC), because we can hear adversarial argument, balancing the public need for security against the need for public scrutiny, the interests of privacy and free speech. The Tribunal can thus give, after an open hearing, its decision in an open judgment, and the legal conclusion can then be applied to the actual facts, which it can subsequently consider in private, as necessary with the assistance of an independent Counsel to the Tribunal.

This procedure, with the assistance of such counsel, has in recent years had dramatic results. It has led to the public disclosure of much which was previously closed, particularly the rules and procedures under which the Agencies operated (subject to necessary redactions). Thus in recent cases the lawfulness of interception warrants pursuant to s8(4) of RIPA, the existence and lawfulness of the Harold Wilson doctrine, whereby it was said that parliamentarians were exempt from interception, and the legality of activities of GCHQ in carrying out 'hacking' and, most recently, of the collection by the Agencies of what is called Bulk Data (a practice only revealed in 2015) have been considered by us. As a result of those cases before us, all the underlying regulations under which the Agencies operated in that regard (redacted as necessary) have been disclosed for the first time. On the whole, the Tribunal has endorsed those procedures, at least since the date when they were for the first time disclosed to the public. In the case of Belhadj, in which the Claimant complained of interception of his legally privileged communications, after disclosure of the relevant procedures the Government conceded their inadequacy by reference to the ECHR, just prior to a planned hearing.

The Tribunal has become much busier in the last 2 or 3 years, not just because of Snowden but for a variety of reasons including publicity of the fact that the Tribunal can and does give remedies by way of making public otherwise secret procedures, quashing authorisations and in appropriate cases making orders for compensation. Its procedures were approved by the ECtHR in Kennedy v UK in 2010. The new Act does not affect the Tribunal, save that it introduces a route of domestic appeal in addition to Strasbourg.

Biography



Sir Michael Burton has been the President of the Investigatory Powers Tribunal in the UK since 2013. From 2000 to 2013, he was its Vice-President.

Sir Michael was a scholar at Eton College and then at Balliol College, Oxford where he read Classics and then Law obtaining his MA. He was a lecturer in law at Balliol from 1970 to 1973. He was called to the Bar in 1970, became a QC in 1984, and was appointed a High Court Judge in 1998. He had a busy commercial practice in the Queen's Bench Division, Chancery Division, Commercial Court and Employment courts, in a wide variety of fields of Law, and sat for many years as a Recorder and Deputy High Court Judge. He was Head of Littleton Chambers from 1991 to 1998.

During his tenure as a High Court Judge from 1998 until 2016 he sat in Queen's Bench and Chancery Divisions, Commercial Court, Administrative Court, Family Division, Revenue List and the Employment Appeal Tribunal, of which he was President from October 2002 to December 2005. He was Chairman of the High Court Judges Association from 2010-11. He has been since 2000 the Chairman of the Central Arbitration Committee, pursuant to the Employment Relations Act 1999. He was Treasurer of Gray's Inn in 2012 and remains a Bencher, and is an Honorary Fellow of Goldsmiths College, University of London. He is editor of Civil Appeals (2nd Ed Sweet Maxwell) 2013.

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[Dr Nathalie Moreno](#)

New surveillance laws in France and the implications for civil liberties and basic procedural safeguards

Dr Nathalie Moreno, Partner at Lewis Silkin, shares her comments on the current developments in relation to surveillance laws in France. The article is part of her contribution to the Law Societies' Brussels Office **panel on mass surveillance** during the **Computers, Privacy and Data Protection Conference** on 27 January.

Law makers in European democracies are challenged to draft legislations which strike a balance between the protection of citizens on one side and the ever increasing and pervasive threats of terrorism on the other side. In many instances, the application of the principle of proportionality to the States' response to such threat is being challenged by the development of new communications technologies which while allowing for more efficient and unprecedented quality and quantity of data which constitute new threats to privacy and individual liberties. All surveillance laws passed these past couple of years in the EU and in France and in the UK in particular have somehow "normalised" the system of mass surveillance and retention of personal data by the state which was first brought to the attention of the public by Edward Snowden's reports in June 2013.

In the wake of the terrorist attacks at the Charlie Hebdo offices on 7 January 2015, France adopted a very controversial Law on Intelligence of 24 July 2015 (Law no2015-912) reflecting the will of the government to gain increased powers of control potentially at the expense of civil liberties, in the name of national security but also surprisingly other state interests.

Admittedly, the law has the merit to provide France with a single legal framework for its intelligence gathering activities, by defining applicable principles, the different techniques that are used and by reinforcing control by the state and its agencies. While the government argued that the law was needed to take account of changes in communications technology, the law was heavily criticised by privacy activists as opening the door to a dangerous extension of mass surveillance by the state and threatening the independence of the digital economy.

The law established a new independent commission called the Commission for Oversight of Intelligence Gathering Techniques (the CNCTR or "Commission"). A few features of the law drew serious criticism for failing to submit the government's powers to judicial review. Under the law, intelligence gathering activities can only be implemented subject to the Prime Minister's specific authorisation. Although such authorisation may only be granted after the Commission's approval, the Commission's opinion does not bind the Prime Minister. Nevertheless, if the Prime Minister decides to ignore the recommendation of the Commission, the Prime Minister must be prepared to explain his or her reasons. There is in theory however the possibility for the Commission to challenge and appeal the Prime Minister's decision before France's Supreme Administrative Court, the Conseil d'Etat.

The law drew comparison with the US Patriot Act which grants broad surveillance powers to the state with state-approved eavesdropping and computer-hacking. Indeed, like the Patriot Act, the French law allows the government to monitor phone calls and emails of terrorism suspects without obtaining a warrant.

In doing so, France was merely joining countries such as the US or the UK where the authorities have the right to intercept and access people's communications at will. Such practices although tolerated for national security reasons are still clearly perceived as a violation of the international human rights to privacy and free speech.

The most controversial provision in the new law relates probably to the so-called black boxes that intelligence agencies can require operators and hosting providers to install. Indeed, the law allows intelligence agencies to deploy algorithms to analyse traffic and log data on an anonymised basis to detect suspicious activity and potential terrorist threats, after authorization from the Prime Minister. Clearly analysing the traffic and log data of the entire population of France may constitute a violation of the proportionality principle as defined in the European Court of Justice's Digital Rights Ireland decision (Judgment of the Court (Grand Chamber), 8 April 2014).

Biography



Dr Nathalie Moreno is an experienced commercial technology lawyer specialising in advising technology-enabled businesses on IT transactions, commercial agreements and privacy in EMEA and globally.

She advises multinational clients on UK, French and EU data protection, privacy and cyber security issues including on UK and multi-jurisdictional compliance programmes and audit projects. She also regularly advises on services, supply, distribution and licensing arrangements, internet and other e-commerce issues in the European Union. She provides advice under both English and French law after practicing in several jurisdictions including Belgium, France, USA and the UK.

She is a regular speaker at industry and legal conferences and is well known amongst UK, France and EMEA General Counsels in Europe for her expertise. She is one of the Ambassadors of the FrenchTech London group and is a French Foreign Trade advisor regularly advising French companies entering the UK market. She has recently been appointed Head of the Brexit Task Force at Lewis Silkin.

Peter Wright

The Computers, Privacy & Data Protection Conference 2017

On Friday 27 January, I was privileged to Chair a panel discussion at the Computers, Privacy & Data Protection Conference 2017 in Brussels. The Event was organised by the Joint Brussels office of the Law Societies of England & Wales, Law Society of Scotland and Law Society of Northern Ireland. The panellists included Dr. Nathalie Moreno, Margarete Graefin von Galen of the German Federal Bar and Professor Nico van Eijk of the University of Amsterdam providing a more academic perspective. We were also planning in having the Chair of the UK Investigatory Powers Tribunal Sir Michael Burton join us, but due to a delay on the Eurostar out of London he was unable to join us.

The timing of the panel was opportune given that this very same week the Law Society of England and Wales had launched its Capturing Technological Innovation Report which covers issues including Legal Technology suppliers, Fin Tech, AI, online courts, Innovation Hubs, Robotic Process Automation and Predictive Analytics. It also builds on many of the themes covered in the Law Society's 2016 report on the Future of Legal Services.

It was a good opportunity to reflect on the recent introduction in the UK of the Investigatory Powers Act, and the fight that the Law Society undertook in lobbying for the protection of Legal Professional Privilege. Legal Professional Privilege is often a right that is all too easily taken for granted or overlooked, so accustomed are we in a society where the Rule of Law has underpinned government for several centuries. However when the initial draft bill was published, nowhere in its labyrinthine sections was there any mention of any exemption for Legal Professional Privilege from the state surveillance powers that were outlined. Indeed not many areas at all were initially marked out as being exempt. Communications between journalists and their sources would also have been liable for interception. One of the only exemptions outlined in the bill referred to communications by MPs, and the Prime Minister would have had to personally authorise the interception of any communication regarding any MP. So exemptions were there, it was just that lawyers and journalists would not benefit from them.

An additional hurdle was placed in the way by the terror attacks across Europe including Paris and Brussels, which led to a heightened climate of security and the bill being pushed through with somewhat greater haste than might have at first been envisaged. Periods for consultation were comparatively shorter than was initially expected, but the Act eventually became law in line with the necessity to replace the provisions in previous legislation covering bulk data surveillance that was about to expire. The Law Society was able to make its case effectively at every stage of the consultation, security protection of the face of the bill for Legal Professional Privilege for the first time in any communications surveillance legislation. While the protections secured did not go far enough for some, the significant gains secured compared to when the first draft of the bill were published are considerable.

The Law Society is a thought leader in the field of technology and its future application to the legal profession, last year publishing its Future of Legal Services report and this year publishing its Capturing Technological Innovation report. The report looks at the tech suppliers in the legal profession along with examining the emergence of Fin Tech and AI. It considers the Online Court and the implications for Access to Justice as well as innovation hubs, Robotic process Automation and predictive analytics and these reports can be accessed, for free, from the Law Society website.

Biography



Peter Wright is a Solicitor and Chair of the Law Society of England and Wales' Technology & Law Reference Group.

Peter runs DigitalLawUK Ltd, which has pioneered the provision of Legal Advice to the Digital and Creative sector while also offering crucial advice to all businesses on Digital Issues including bespoke Data Protection Audits that review the handling and storage of a business's data, their data protection policies and procedures, their social media and marketing plans and highlighting any inherent risks while also advising on a road map to govern future activity.

Peter has spoken across the UK on Digital, Data Protection and Social Media Law issues and is working closely with the Law Society on Data Protection Best Practice for Law Firms.

The Commission unveils its data economy package

On 10 January 2016, the EU **unveiled** its Data Economy Package, consisting of **a new Proposal for a regulation on privacy and electronic communications**, **a Communication on Exchanging and Protecting Personal Data in a Globalised World** and a **Consultation on building the European data economy**.

The measures aim to update current rules, extending their scope to all electronic communication providers as well as maintaining trust in the Digital Single Market.

The proposal is made in line with the Commission's Digital Single Market Strategy ("DSM Strategy") which aims to tear down regulatory walls and finally move from 28 national markets to a single one. A fully functional Digital Single Market could, the Commission claims, contribute €415 billion per year to the European economy and create hundreds of thousands of new jobs.

The Commission has already adopted the Regulation (EU) 2016/679, the **General Data Protection Regulation** ("GDPR"), which was a key action for increasing trust and security of digital services, and it is noteworthy that complements and particularises the GDPR. The DSM Strategy also however aimed to review Directive 2002/58/EC ("ePrivacy Directive") in order to provide a high level of privacy protection for users of electronic communications services and a level playing field for all market players.

The proposed Regulation aims to update the current ePrivacy Directive with a directly applicable Regulation so that all people and businesses in the EU will enjoy the same level of protection for their electronic communications. It also aims to reflect current technological developments, whereas the current ePrivacy Directive only applies to traditional telecoms operators, the new proposal will now also cover new providers of electronic communications services, such as WhatsApp, Facebook Messenger, Skype, Gmail, iMessage, or Viber.

The proposal also aims to guarantee privacy for both content and metadata derived from electronic communications (e.g. time of a call and location) as well as providing simpler rules on cookies. New rules will allow users to be more in control of their settings, providing an easy way to accept or refuse the tracking of cookies and other identifiers in case of privacy risks.

The Commission's Communication further sets out a strategic approach to the issue of international personal data transfers, which will facilitate commercial exchanges and promote better law enforcement cooperation, while ensuring a high level of data protection. The Communication also reiterates that the Commission will continue to promote the development of high data protection standards internationally, both at bilateral and multilateral levels.

The Commission is also currently conducting a consultation on building the European data economy which will run until 26 April 2017 and feed into the Commission's possible future initiative on the European Data Economy later in 2017.

With the presentation of the package and the proposed measures, the Commission is calling on the European Parliament and the Council to work swiftly and to ensure a smooth adoption by 25 May 2018, when the General Data Protection Regulation will enter into application. The intention is to provide citizens and businesses with a complete and compatible legal framework for privacy and data protection in Europe by May 2018.

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EU fights fake news

Amid increasing concerns that Russia will use disinformation to sway the upcoming elections in the Netherlands, France, Germany, the Czech Republic, and Sweden, the EU has allocated additional funds to its "**East StratCom**" team to expose fake news.

The task force was set up in 2015 by the European External Action Service (EEAS) after it was **revealed** that Russia and was engaged in aggressive messaging and a deceptive media campaign to undermine the EU.

Through a combination of misinformation and propaganda, including by trolling organisations and people on social media and releasing misleading news items on state media outlets such as RT and Sputnik, Russia has been depicting the West as an aggressive and expansionist entity, as well as being close to crumbling under the combined pressure of the fiscal and migration crises.

It has been reported that several Kremlin-financed media outlets are spreading anti-Western conspiracy

theories including that the disappeared Malaysian MH370 airplane might have been shot down by the US, that the West is killing off defence witnesses of Serbian war criminals in the Hague and that a 1,000-strong mob chanting "Allahu Akbar" burned down Germany's oldest church.

East StratCom is now composed of 11 staff dedicated to effectively communicating and promoting EU policies to counter the Kremlin's strategy, strengthening the overall media environment in the Eastern Neighbourhood (which includes Armenia, Egypt, Israel and Moldova) and in Member States, and improving EU capacity to forecast, address and respond to disinformation activities by external actors.

The team conducts proactive strategic communications campaigns, based on focused analysis that explains key policy areas and creates a positive EU narrative. In particular, they release a '**Disinformation Review**' and a 'Disinformation Digest' on a weekly basis, which offer a systematic overview of cases of disinformation and highlight broader media trends. They also communicate on an ad-hoc basis on topical and relevant EU policy issues and analyse disinformation trends, explaining disinformation narratives and myth-busting.

So far the team claims to have found nearly 2,500 examples of Russian disinformation, although officials believe this is only scratching the surface.

East StratCom has now received an extra cash injection taken from other parts of the EEAS budget. The move comes as Europe **fears** that Russia will use fake news to swing the upcoming elections in Germany, France, Sweden, the Czech Republic and the Netherlands to the advantage of anti-European parties with the ultimate aim of weakening the EU, in the same way that Putin was reportedly able to **influence** the US elections in favour of Trump, for whom he had a clear preference.

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The Article 50 legal challenge: clarifying the UK's constitutional requirements to start Brexit

On 24 January, the Supreme Court decided, by a majority of eight judges to three, that the Government can only trigger Article 50 – the process by which the UK can leave the EU – after an Act of Parliament has been passed. Nothing less will do. This ruling made constitutional history and clarified the extent of the powers of the executive - in this case, the Prime Minister of the United Kingdom, Theresa May, and of the UK Parliament.

There was, and remains, a common misconception that this case set out to defy the referendum result and, ultimately, to stop or delay Brexit. Put plainly, it did not. What the aftermath of the referendum revealed was a staggering lack of clarity around the legal procedure to be followed under the UK's constitutional requirements (per Article 50(1) of the Lisbon Treaty) when leaving the EU. Ultimately, to get clarity this case had to go right to the heart of the application of the constitutional principles of the separation of powers, parliamentary sovereignty, the independence of the judiciary and the rule of law. This has been a necessary process to ensure that the UK leaves lawfully, securing legal certainty, before rather than after the event.

The question at the centre of the case concerned whether the Government can remove a source of domestic constitutional law and/or domestic rights granted by an Act of Parliament and arising under the EU Treaty. This was set against a constitutional backdrop in which Parliament is sovereign as regards the making of laws (other than the common law), but subject to the rule of law as enforced by the courts. The electorate is sovereign politically. Parliamentary sovereignty as regards domestic laws means that we must have a dualist constitution: only Parliament can give effect to international treaty rights/obligations in domestic law, as opposed to international rights/obligations as between states under international law.

The key arguments of the lead claimant, Gina Miller, represented by Mishcon de Reya, took the judges back to cases and statutes in the seventeenth century, including the Bill of Rights, which demonstrated that Parliament is sovereign as law-maker. The residual Royal Prerogative powers of the Government - regarding international relations, and treaties in particular - exist solely in relation to international law rights/obligations. EU rights and obligations are made domestic law by virtue of the European Communities Act 1972 (ECA). Once the Government triggered Article 50, the Notice would be irrevocable, and there would therefore inevitably be a loss of at least some rights in domestic law under the ECA. Therefore, only Parliament can grant such a power, and it requires an Act of Parliament to do so.

The Supreme Court agreed with Gina Miller's case and noted that the Government's case would lead to perverse results; if correct, it meant that the Government could always have withdrawn the UK from the EU

without reference to Parliament. It could do so even if there was a referendum result in favour of remaining in the EU.

As a result, the Government published The European Union (Notification of Withdrawal) Bill to gain Parliament's permission to start the Brexit process without conditions as to the negotiation strategy and objectives. The aim is that this will be achieved well ahead of the stated deadline of 31 March 2017.

It remains to be seen whether the Bill will be amended by the UK Parliament to fetter the Government's discretion and/or impose requirements for Parliamentary security of the process. Furthermore, there is an application in the English court in relation to withdrawal from the EEA under Article 127 of the EEA and one concerning the revocability of the Article 50 Notice in the Irish court (seeking a referral to the CJEU).

Among the lessons to be learned are that there is considerable ignorance as to the fundamental principles of our constitution, as regards the nature of representative parliamentary sovereignty, the role of referendums and the role of the court in upholding the rule of law. This is a real weakness in our system which needs to be corrected. On a positive note, the courts managed the whole process in under seven months, a clear indication of the efficiency of our judicial system which has been noticed both nationally and internationally. And, last but not least, any future referendum will no doubt spell out what, if any, the legal consequences of the result will be.

Biography



Rob Murray is a partner in Mishcon De Reya's Dispute Resolution department. He specialises in competition law damages claims and has represented clients in leading competition damages claims in the English High Court and the Competition Appeal Tribunal. Rob is ranked as a Leading Individual for Competition Litigation in Legal 500 2015 and Chambers & Partners 2016. Rob is also Council Member of the European Maritime Law Organisation and a member of the Steering Committee of the European Competition Litigation Forum. He is also a former Reporting Panel member of the UK Competition Commission.

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May's Brexit plan is unveiled

After nearly seven months of giving little away on the issue since the UK's shock vote to leave the EU, on 17 January, Prime Minister Theresa May **unveiled** the UK government's negotiation position for its upcoming talks on its withdrawal from the EU.

The revelation was shortly followed by a **white paper** setting out the UK government's plans, released following the Supreme Court's **decision** that the triggering of Article 50 had to be approved by an Act of Parliament.

In what was seen by some as a surprise move, it was revealed that the government intends to take the UK out of the **single market** and the customs union in order to restrict movement of EU citizens to the UK, a central issue during the referendum campaign, after various EU leaders warned that the UK could not remain in the single market without accepting the freedom of movement.

Instead, reiterating the phrase on her podium, "A Global Britain", May wants to negotiate a "new, comprehensive, bold and ambitious free trade agreement" with the EU, in return for which the UK would be willing to contribute funds to some specific EU programmes but at a level far smaller than current UK contributions. The UK will at the same time focus on increased trade with third countries, including China, Brazil, the Gulf States, Australia, New Zealand, India, and, in particular, the US, following President Trump's **pledge** to seek a rapid trade deal.

It was also revealed that the UK would no longer be under the jurisdiction of the European Court of Justice, because "we will not have truly left the EU if we are not in control of our own laws".

It was not all change however. The government wishes to continue to co-operate on crime, defence and foreign affairs and collaborate on major science, research and technology exploration, protect and enhance workers' rights, many of which derive from EU legislation, and maintain the Irish **Common Travel Area**, working for a practical solution for the border between Northern Ireland and Republic of Ireland, which has been seen as a thorny issue. Of particular interest to the Law Societies, the white paper recognises the need to maintain rules allowing for the mutual recognition and enforcement of civil court judgments.

As a matter of priority, the government wants the rights of EU citizens currently living in the UK and UK citizens living in the rest of the EU to be protected. May revealed that many of the remaining EU27 leaders

favour such approach but that "one or two others do not".

In a relief to many businesses, the speech and white paper recognised the need for a smooth and orderly Brexit, accepting that, once the future partnership between the UK and the EU is established, an implementation period would be needed.

It was also revealed that the final deal would be put to a vote in Parliament, a revelation that saw the pound **soar**.

During her speech, May warned other European leaders that the UK is prepared to fall out of the EU if she cannot negotiate a reasonable exit deal, stating that any attempt to inflict a punitive outcome on the UK would be an "act of calamitous self-harm", in what was seen as a reference to the UK's option to dramatically **decrease** taxes to attract companies.

The revelations were met with a cautious welcome by European leaders, with Donald Tusk, the President of the European Council, tweeting "sad process, surrealistic times, but at least more realistic announcement on Brexit" and Germany's foreign minister welcoming "a bit more clarity about the British plans". Meanwhile, the Maltese prime minister, Joseph Muscat, whose country holds the Presidency of the Council of the EU, promised a fair deal for the UK but one that would necessarily be inferior to EU membership and Jean-Claude Juncker, President of the Commission, said Brexit talks will be "very, very, very difficult".

Scotland's First Minister, Nicola Sturgeon, who had **championed** the UK remaining in the single market after the region voted overwhelmingly in favour of remaining in the EU, was notably regretful about the news, **stating** that another referendum on Scotland's independence from the UK was "all but inevitable".

Negotiations will begin once the UK has triggered Article 50.

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European Parliament elects its President

On 17 January, MEPs **elected** Antonio Tajani of the centre-right European People's Party (EPP), Parliament's largest group, as the new President of the European Parliament by 351 votes in the fourth and final ballot in what was one of the most competitive elections in the institution's modern history. Gianni Pittella of the second largest party, Socialists & Democrats (S&D), received 282 votes.

While the European Parliament is elected for a five-year term, the President and Vice-Presidents are elected by their peers for a two and a half year period.

There has been a long-lasting tradition of the EPP and S&D Groups splitting the two two and a half year terms between them. However, as the former President S&D's Martin Schulz's term was coming to an end, Pittella, who is head of the S&D Group, decided to break this so-called 'power-sharing agreement' by announcing his candidacy in November 2016.

In another twist, EPP and the Alliance of Liberals and Democrats for Europe (ALDE) decided to form a pro-European coalition with its leader, Guy Verhofstadt, dropping out of the race in a move that won the vote for Tajani but attracted criticism of Verhofstadt, who **some** saw as willing to do just about anything to strengthen his position.

Tajani himself comes not without controversy. He a confidant of the divisive former Italian Prime Minister, Silvio Berlusconi, who nominated him for two terms in the Commission from 2008 to 2014, during which time Tajani played an integral role in José Manuel Barroso's Presidency of the Commission.

Most notably, Tajani was allegedly **informed** in 2012, when he was Industry Commissioner, by the manager of an autoparts supplier about manipulation of emissions tests and the existence of so-called defeat devices. In 2015, it came to light that Volkswagen was using such technology, leading Tajani to be assessed for his complicity in the affair by a European Parliament investigative committee.

Tajani's victory means that the EPP has the leadership of all three EU institutions - the Parliament, Commission (led by Jean-Claude Juncker) and the Council (led by Donald Tusk).

Tajani however, in a dig to Schulz who gained a reputation for meddling in all aspects of parliamentary life, stated that "it is not for the European Parliament president to push a political agenda", saying instead that he would remain neutral and let MEPs take the lead on defining political priorities.

Indeed, the President's **role** is to represent the Parliament vis-à-vis the outside world and in its relations with the other EU institutions, to oversee the work of the Parliament and debates in plenary and ensure that Parliament's Rules of Procedure are adhered to, rather than to make policy.

Nevertheless, his election marks a victory for the centre-right, with the group's chairman, Manfred Weber, describing 17 January as "a good day for the EPP".

The day after the election of Tajani, the institution's 14 Vice-Presidents were elected, including four EPP candidates and five S&D candidates.

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Five Star Movement tries to jump ship

Members of Italy's populist Five Star Movement (M5S) voted overwhelmingly to leave their alliance in European Parliament with the UK Independence Party (UKIP); however, after some dithering by the Alliance of Liberals and Democrats for Europe (ALDE) party, they found themselves with nowhere to go.

M5S and UKIP joined together to form the Europe of Freedom and Direct Democracy party (**EFDD**) in June 2014, after both parties won substantial votes in the EU elections that May. Then UKIP leader Nigel Farage said at the time that the two eurosceptic parties shared a wish "for the citizens of Europe to have more of a say and that any further moves towards the centralisation of powers should only be legitimised by free and fair referenda."

The group now holds 42 seats out of the 751 available in Parliament, giving the parties' MEPs more power to support or block legislation and greater access to funding than they would separately.

In early January, however, in an online poll of M5S's members, 80% of members agreed to join ALDE, following the opinion of their leader Beppe Grillo, who thought that UKIP had achieved its political goal when the UK voted to leave the EU.

Grillo also said he had approached the Greens about a possible alliance, but was rejected; ALDE was the only group willing to discuss a joining of forces, attracted by the chance to increase their party numbers and once again become the third largest in Parliament.

After some deliberation, however ALDE, led by Guy Verhofstadt, who believes in deeper EU integration, rejected M5S saying that "there remain fundamental differences on key European issues" between the two parties.

The move came to the delight to Farage who had scorned Grillo's attempts to leave and join the "Euro-fanatic establishment".

M5S's MEPs therefore remain part of the EFDD, having made no formal application to leave.

The debacle, however, has started to expose the internal contradictions of the group; two M5S MEPs have left the group, one joining the Greens, another the Europe of Nations and Freedom, the extreme right group of Marine le Pen. If more will follow, UKIP's influence in Parliament and funding will be reduced.

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Ratifying CETA

The signing of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) **last October** marked a significant step in bringing the trade deal into effect; however, CETA still faces uncertainty with the ratification process.

The EU-Canada free trade deal received backing from the European Parliament and Germany's top court on January 12 after it **rejected emergency attempts by activists** to stop Berlin endorsing the accord before ratification by the national parliaments.

The accord made its way through the European Parliament's Trade Committee (INTA) on **24 January 2017**, before it now heads to the full European Parliament plenary, with the 751-member legislative body then expected to vote on CETA on 13 February 2017.

Across the pond, on January 30, 2017, the Standing Committee on International Trade in Canada **approved** "an Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for certain other measures". The next step in the process is third reading in the House of Commons and from there, the bill will move to the Senate.

Further problems lay in wait however, as in December 2016, Advocate General Eleanor V. E. Sharpston

wrote that 'free trade' agreements must be ratified by all thirty-eight national and regional parliaments in the European Union. The European Court of Justice will publish its final ruling in three to six months and it could confirm that EU member states (and regions) other than Belgium have to ratify the deal, which could allow a Wallonia-type situation to crop up again.

Appetite within Europe for free trade deals may still also prove a decisive pressure point for national parliaments even after ratifying the deal. Notably, there will be a referendum in the Netherlands that is likely to produce a strong 'no to CETA' vote. It has been **reported** that, activists in the Netherlands have gathered almost two-thirds of the signatures needed to lay the groundwork for a referendum on CETA, however, the petition can only be launched once parliament has ratified the deal.

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UK trade deals post-Brexit

Trade deals for the UK, post-Brexit, are still somewhat of an unknown entity. Who they will be with and what they will mean for business at home and abroad are still unclear.

It would be understandable then if, after the breakup of a 40-year relationship, Britain were anxious to ensure an amicable deal with the EU, or secure a concrete trading deal with a new partner... but currently it appears she is just happy playing the field.

Early 2017 has seen Britain making advances to **Australia** and the **US**, securing interest from both parties, while also sounding out potential future relationships with China, India and New Zealand. International trade secretary, Liam Fox, has even said that the UK is "discussing the possible shape of new agreements" **with at least 12 countries**, adding that dozens more had shown interest in making a more meaningful link with the UK.

The coquettish behaviour of the UK, however, doesn't stop there, as Britain continues to send mixed signals to the EU. Initially in her speech on 17 January 2017, Ms May appeared ready to cut all ties with the Union, **stating** that "no deal is better than a bad deal for the UK", but only **a day later**, she told MPs that she would "deliver" a new trade deal with the EU before Brexit to avoid inflicting punishing World Trade Organisation tariffs on businesses.

While these actions may seem harmless to the UK it appears that it has caught the green-eyed gaze of members of the EU, who appear unhappy that the UK is looking to move on before a divorce is finalised, and it has prompted some rather strong words from officials.

The European Parliament's chief Brexit negotiator has **rubbished Theresa May's pledge** to deliver a new EU trade deal by 2019 as "impossible", while Commission Spokesman Margaritis Schinas has **stressed**, "there is nothing in the treaties that prohibits you from discussing trade, but you can only negotiate a trade agreement after you leave the European Union." The Commission's President, Jean-Claude Juncker, has also **said** that for EU members trade talks are "exclusively a matter of the EU", and Trade Commissioner Cecilia Malmström **reiterated** recently that trade negotiations before Britain leaves the bloc – expected to be by March 2019 – were not permitted.

The Prime Minister of Malta, which holds the rotating EU presidency, has also **weighed in** on the debate to confirm that it is "very clear that in order to sign and have a bilateral agreement with third countries, the UK first needs to reach a settlement with the EU".

It is yet unclear how the EU could draw the line between talks and formal negotiations, but it is accepted that no agreements may be signed while the UK remains an EU member. It is possible however that the UK may be free to start talks as soon as Britain begins the legal process of leaving the union, which May has said it will do by triggering Article 50 by the end of March.

While some acrimony is inevitable in the breakdown of any relationship, it remains to be seen just how composed both the UK and EU will be in the approaching trade talks. In any event, the die has now been cast and both parties will have to do their best to negotiate an amicable new relationship with one another before matters are taken out of their hands and into those of the WTO.

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Ruling robots

On Thursday 12 January 2017 MEPs called for EU-wide rules in the ever-expanding field of robotics. The

report, which was approved by 17 votes to 2, with 2 abstentions, looks at contentious robotics-related issues that may arise in the future surrounding safety, liability, ethics and changes in the labour market.

Rapporteur Mady Delvaux MEP of the S&D party called for an EU lead initiative into the regulation of robotics, **stating**, "A growing number of areas of our daily lives are increasingly affected by robotics. In order to address this reality and to ensure that robots are and will remain in the service of humans, we urgently need to create a robust European legal framework".

The draft proposals are the result of a long standing **parliamentary working group** which was established in January 2015 to investigate legal questions relating to the development of Robotics and Artificial Intelligence.

The report states that EU-wide rules are needed to safeguard against potential job losses while also ensuring that companies can utilise the economic advantages that robotics and AI has to offer them. Notably, the end of 2016 provided many with a reminder of the problems technological advances can cause for jobs, as **ING announced** that it plans to save €900 million (\$1 billion) a year by cutting 5,800 jobs as part of a "digital transformation." A further 1,200 employees would have their jobs changed or moved, it was announced.

The MEPs also advocate the creation of a European agency for robotics and artificial intelligence in order to "provide the technical, ethical and regulatory expertise needed to support the relevant public actors, at both EU and Member State level, in their efforts to ensure a timely and well-informed response to the new opportunities and challenges arising from the technological development of robotics."

The report further suggests that there should be a "guiding ethical framework" for the design, production and use of robots in the future in order to complement the existing national and EU law. This ethical framework, it is suggested, could also include a code of conduct for robotics engineers and a code for research ethics committees when reviewing robotics protocols and of model licences for designers and users. One particular ethical consideration for design engineers, which the report suggests, and which was **picked up on by the media** was the inclusion of "kill switches" in the robots.

Regarding the contentious issue of liability, the MEPs report states harmonised rules are urgently needed in some rapidly evolving areas such as that of the self-driving cars. In the longer term, it is suggested that the most advanced robots could potentially be given specific legal status of "electronic persons". They call for an obligatory insurance scheme and a fund to ensure victims are fully compensated in cases of accidents caused by driverless cars.

The purpose of the report is to invite the Commission to present a legislative proposal. The Commission is under no obligation to do so, but must state its reasons if it refuses.

The Parliament's full house is now due to vote on the draft proposals in February, which will need to be approved by absolute majority according to the legislative initiative procedure.

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*Professional
Practice*

The Commission's long-awaited services package is released

In a bid to make it easier for companies and professionals to provide services across the EU, on 10 January, the Commission today released its long-awaited **services package**.

As **previously reported**, the Commission has been looking to give fresh impetus to the services sector by removing obstacles to the growth and exchange of services in the EU, in particular within regulated professions, including the legal profession.

Following its 10 week public consultation held in the summer on the proportionality of professional regulation and Member States' National Action Plans (created by Member States as part of a 'mutual evaluation and transparency' exercise), the Commission released its proposal which includes: a new European Services **e-card** that service providers could use to show compliance with applicable rules; a **proportionality** assessment of national rules on professional services; and an improved **procedure** for Member States to notify the Commission when drafting measures introducing new requirements or authorisation schemes in relation to services.

Under the proposed Directive establishing the proportionality assessment, Member States will be required to

ensure that, before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions or amending existing ones, an assessment of their proportionality is undertaken.

Any new rules will therefore need to be justified by 'public interest objectives', such as the protection of consumers and the safeguarding of the proper administration of justice and must be "necessary and suitable for securing the attainment of the objective pursued and [must] not go beyond what is necessary to attain that objective".

The package also includes **guidance** recommending national reforms in relation to the regulation of professions, which includes an assessment of the legal profession.

In particular, the guidance, which is non-binding, recommends that the UK assesses "the possibilities for adopting a more flexible approach as regards professional liability insurance obligations so as to reduce the financial burden for professionals".

The Law Societies Joint Brussels Office will monitor the developments around these policy dossiers and liaise with the Commission to gain more insight into the long-term plans for new legislation.

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The Law Societies Brussels Office's Helena Raulus and the Law Society of England and Wales' David Greene give evidence and the House Of Lords

On 10 January, Chair of the Law Society of England and Wales' Legal Affairs and Policy Board, David Greene, and the Law Societies Brussels Office's Internal Market Policy Adviser and Interim Head of the office, Dr Helena Raulus, gave evidence to the Lords EU Justice Sub-Committee on civil justice co-operation and the Court of Justice of European Union. The session focused on the impact of Brussels I and Brussels IIA, which allow judgments made in the EU in civil and commercial matters to be recognised and enforced across the EU, with an emphasis on their impact on individual citizens.

The Law Society of England and Wales briefed parliamentarians on the access to justice debate that took place the following day and was mentioned eight times in relation to its works on small claims, employment tribunal fees and legal aid deserts by MPs.

The Justice Select Committee undertook its oral evidence sessions for the inquiry into the impact of Brexit on the justice system with a focus on the criminal justice system.

The oral evidence submitted can be found [here](#).

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The Law Societies Joint Brussels Office hosts its Annual New Year Reception

On 31 January, the UK Law Societies hosted its annual New Year reception at its Brussels offices.

The reception was held together with the bars of Austria (Österreichische Rechtsanwaltskammertag), Belgium (Ordre des Barreaux Francophones et Germanophone de Belgique) the Czech Republic (Ceská advokátní komora), Germany (Bundesrechtsanwaltskammer) and Luxembourg (Barreau de Luxembourg).

The reception was a perfect way to meet and make connections with the UK Law Societies' stakeholders and Office Partners with Lorna Jack, CEO, and Kevin Lang, Executive Director for External Relations, of the Law Society of Scotland present, as well as Joe Egan, Vice-President, Stephen Denyer, Director of Strategic Relationships, and Sophia Adams Bhatti, Director of Legal & Regulatory Policy, of the Law Society of England and Wales present.

Law Societies Joint Brussels Office takes part in the European Judicial Network

Rita Giannini, the Law Societies Joint Brussels Office's Justice Policy Advisor, attended the 15th Annual Meeting of the Members of the European Judicial Network in civil and commercial matters on 1-2 February.

The network aims to simplify judicial cooperation between the Member States and gives unofficial support to the central authorities as stipulated in their instruments, facilitating relations between different courts.

Highlights of the meeting included a discussion of the important decisions in civil justice matters by the Court of Justice of the EU in the last year, and presentations on the application of the new Insolvency Regulation and the Regulations on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and on property consequences of registered partnerships.

More information on the European Judicial Network can be found [here](#).

Law Societies Joint Brussels Office takes part in the English@Work Programme

Two Belgian senior high school students, Eliman Steenbergen and Sebastian Vandermeersch, left their classrooms to attend a three-day work placement with at the Law Societies Joint Brussels Office through the English@work program of the British Chamber of Commerce in Belgium.

The programme, now in its eight year, aims to allow students to experience a real-life work environment and develop their English skills.

The students came from the two partner schools: KSD (Katholiek Scholen Diest), a Flemish Catholic school in Diest, and the British School of Brussels, an international school in Tervuren.

During their stay, the students, who are both keen to pursue a career in law, learnt about the workings and functions of the UK's various Law Societies, as well as roles of the office's policy advisors, sitting in on meetings, reporting on European parliamentary committee meetings, writing articles and presenting an overview of recent news events.

Eliman wrote: *'I think that everyone needs to take the chance to do a project like this. It is very different compared to school, because you get to use and improve your knowledge and business skills in real-life without any teacher telling you how to do it. It makes you step out of your comfort zone and gives you a nice experience for later on. One is never afraid of the unknown; one is afraid of the known that it is coming to an end.'*

Law Society of Scotland Street Law Project makes European finals

A Law Society of Scotland education programme for pupils at Scottish schools in disadvantaged areas is up for a prestigious European award.

The Law Society's Street Law programme will battle it out with five other projects from European cities, including Brussels and London, for the title of 'Best training initiative' in the European Association Awards.

Heather McKendrick, Head of Careers and Outreach at the Law Society of Scotland said, "Street Law is an amazing initiative, which sees law students deliver lessons to Scottish school pupils in disadvantaged areas. They learn how the law affects all of us through a series of lively and interactive sessions that are injected with real-life scenarios – and which may encourage some pupils to consider further studies or a career in law. Street Law is a long-term investment in young people in Scotland and a demonstration of the Law Society's commitment to diversity in the legal profession."

Introduced by the Society in 2014, Street Law lessons encourage pupils to consider how the law impacts on their lives and the roles they have to play as responsible citizens. At the same time, they are developing

their critical thinking and communications skills. Feedback from the pupils, teachers, legal students and legal firms has been consistently and resoundingly positive.

A Law Society review of diversity within the legal profession found that fewer than one in 12 entrants to the LLB come from disadvantaged backgrounds. Street Law, which originated at Georgetown University in 1972, was one of the recommended responses to the issue of fair and equal access issue to the profession. The Society's Street Law programme is sponsored by Ashurst, CMS and Pinsent Masons.

The 2015 pilot invited LLB and Diploma students to work with pupils of eight schools in disadvantaged areas across Scotland. Together they looked at the impact of the law in a wide variety of contexts, ranging from real life murder trials, to environmental protection issues and the use of social media.

More information on Street Law can be found [here](#).

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Law Society of Scotland Student Competition 2016/17

A Law Society of Scotland has launched a competition for law students to win a three-week paid work experience placement at the Scottish Parliament and £500 in cash.

Students are required wither to create a video of up to three minutes' length or an 800-word blog on the following question:

How does the rule of law, in the way it is upheld by the Scottish Parliament, have a direct impact upon our lives as citizens of Scotland?

The winner will be picked on the basis of the topic selected and how relevant it is, creativity and originality shown, depth and accuracy of the topic analysis, knowledge of the Scottish Parliament's work and strategies and the ability to break through the legal jargon to convey a clear, simple message.

Applicants must be either a 3rd, 4th year or fast-track LLB student or Diploma in Professional Legal Practice student to enter.

The closing date is 26 February 2017.

For more information, click [here](#).

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The Law Society of Scotland's response on the European Copyright Framework

The Intellectual Property Law Sub-Committee of the Law Society of Scotland has responded to the Intellectual Property Office's consultation on the European Commission's draft legislation to modernise the European copyright framework. This includes the implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, and proposals relating to copyright in the Digital Single Market.

Overall, the Law Society of Scotland supports the Commission's proposals, however it has some concerns about the definitions used in the draft legislation.

The full response can be found [here](#).

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Northern Ireland Young Solicitors' Association holds its AGM

The Northern Ireland Young Solicitors' Association* ("the NIYSA") held its AGM on 13th January and elected its committee for 2017, with David Cairns of Eamonn McEvoy & Co as Chairman and Emma O'Donnell of Carson McDowell as Vice Chair.

At the AGM, a Resolution to amend the Constitution was passed by members, under which all solicitors who

have not reached 10 years' post qualification experience are members of the Association.

Cairns thanked the Law Society of Northern Ireland for its "longstanding and extremely helpful support of the NIYSA".

More information on the NIYSA can be found [here](#).

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Law Society of England and Wales gives evidence to UK Parliament on Brexit

The President of the Law Society of England and Wales Robert Bourns gave evidence to the House of Commons justice select committee on 1 February, saying that UK businesses and families need legal certainty from Brexit negotiations.

As can be seen [here](#), Robert Bourns said that maintaining mutual recognition and enforcement of judgments will help keep the wheels of business turning during and after Brexit, stating that there is a long-established network of co-operation between the UK and the EU which underpins substantial economic activity, which needs to be preserved.

Additionally, the Law Society of England and Wales, including the outgoing Head of the Brussels Office Mickael Laurans, told the International Trade Select Committee on 24 January that UK businesses will continue to need solicitors who can practise across borders as this will be critical in supporting international business following Brexit when giving oral evidence on UK trade options beyond 2019.

The Law Society of England and Wales's evidence, which can be found [here](#) addressed:

- The merits and challenges for the legal sector under World Trade Organization (WTO) and free trade agreements. For instance, the WTO dispute settlement system is a government-to-government system that entails a lack of redress for organisations.
- The impact of non-tariff barriers on solicitors' clients and law firms.
- The benefit to clients of English and Welsh solicitors' rights of audience before EU courts. The loss of these rights could have a significant impact on a number of practice areas including competition law.
- The extent to which clients can benefit from legal professional privilege - of concern to both lawyers and their existing or prospective clients.

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New Interim Chief Executive for Law Society of England and Wales

The Law Society of England and Wales has appointed Paul Tennant OBE as interim chief executive.

Robert Bourns, Law Society president, said: "I am delighted to be working with Paul Tennant whilst we finalise arrangements for recruiting a permanent chief executive for the organisation.

"Paul has been chief executive of a large and complex housing organisation but also has a clear understanding of non-executive leadership roles, having been president of the Chartered Institute of Housing. This perspective will be helpful as we consider future ways of working.

"We have a clear business plan for the year focused on understanding and serving our members, transforming our IT and improving our efficiency and Paul will be working with our executive team to deliver our plans.

"Meanwhile, my focus will be on ensuring we represent the profession effectively through a period of significant change and working with council colleagues and others to progress our governance review.

"We have appointed the Good Governance Institute to help us with the governance review and have also brought member perspectives on to our review working group.

"I will say more about the recruitment of a permanent chief executive in due course and in the meantime thank Catherine Dixon for her hard and effective work with the Society."

Paul Tennant said: "I am looking forward to working with the president, council and staff at the Law Society for the next few months."

Day of the Endangered Lawyer: In solidarity with those at risk

Lawyers across the world run the risk of harassment, imprisonment and even murder just for doing their jobs, the Law Society of England and Wales said as it marked 24 January: the Day of the Endangered Lawyer.

This annual expression of solidarity is recognition of the dangers many lawyers face as they work to uphold and protect fundamental rights.

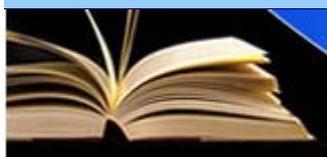
Law Society of England and Wales president Robert Bourns said: "Today is a chance to reflect on the importance of the rule of law and the independence of the legal profession - essential foundations for political, social and economic stability.

"Lawyers must be allowed to carry out their professional duties without interference and should never be identified with their clients or clients' causes."

The country focus for the Day of the Endangered Lawyer 2017 is China.

Robert Bourns added: "The Law Society stands in solidarity with legal professionals around the world. We will continue to fight to ensure the survival of strong, vibrant justice systems everywhere."

Further information can be found [here](#).



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ONGOING CONSULTATIONS

Capital markets

Public consultation on the capital markets union mid-term review 2017

20.01.2017 - 17.03.2017

Competition

Consultation on the Code of Best Practice on the conduct of State aid control proceedings

25.11.2016 – 25.02.2017

Consumer rights

Public Consultation on the rules on liability of the producer for damage caused by a defective product

10.01.2017 - 26.04.2017

Data protection

Public consultation on Building the European data economy

10.01.2017 - 26.04.2017

Internal Market

Public Consultation on the mid-term evaluation of the Connecting Europe Facility (CEF)

28.11.2016 – 27.02.2017

Security

Public consultation on the evaluation and review of the European Union Agency for Network and Information Security (ENISA)

18.01.2017 - 12.04.2017

Trade

Deep and Comprehensive Free Trade Agreement with Tunisia

21.11.2016 – 22.02.2017

Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea

08.12.2016 - 03.03.2017

Taxation

Public consultation - Excise duties applied to manufactured tobacco

17.11.2016 – 16.02.2017

Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes

10.11.2016 – 16.02.2017

Functioning of mutual assistance between EU Member States for the recovery of taxes

30.11.2016 - 08.03.2017

Public Consultation on the special scheme for small enterprises under the VAT Directive

20.12.2016 - 20.03.2017

Public Consultation on the Definitive VAT system for Business to Business (B2B) intra-EU transactions on goods

20.12.2016 - 20.03.2017

Public Consultation on the reform of VAT rates

20.12.2016 - 20.03.2017

COMING INTO FORCE THIS MONTH

Capital markets

Public consultation on the capital markets union mid-term review 2017

20.01.2017 - 17.03.2017

Competition

Consultation on the Code of Best Practice on the conduct of State aid control proceedings

25.11.2016 – 25.02.2017

Consumer rights

Public Consultation on the rules on liability of the producer for damage caused by a defective product

10.01.2017 - 26.04.2017

Data protection

Public consultation on Building the European data economy

10.01.2017 - 26.04.2017

Internal Market

Public Consultation on the mid-term evaluation of the Connecting Europe Facility (CEF)

28.11.2016 – 27.02.2017

Security

Public consultation on the evaluation and review of the European Union Agency for Network and Information Security (ENISA)

18.01.2017 - 12.04.2017

Trade

Deep and Comprehensive Free Trade Agreement with Tunisia

21.11.2016 – 22.02.2017

Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea

08.12.2016 - 03.03.2017

Taxation

Public consultation - Excise duties applied to manufactured tobacco

17.11.2016 – 16.02.2017

Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes

10.11.2016 – 16.02.2017

Functioning of mutual assistance between EU Member States for the recovery of taxes

30.11.2016 - 08.03.2017

Public Consultation on the special scheme for small enterprises under the VAT Directive

20.12.2016 - 20.03.2017

Public Consultation on the Definitive VAT system for Business to Business (B2B) intra-EU transactions on goods

20.12.2016 - 20.03.2017

Public Consultation on the reform of VAT rates

20.12.2016 - 20.03.2017

CASE LAW CORNER

Decided cases

Case T-646/13 *Bürgerausschuss für die Bürgerinitiative Minority SafePack – one million signatures for diversity in Europe v Commission*

- The General Court annulled the Commission's decision to refuse the registration of the proposed European citizens' initiative entitled 'Minority SafePack – one million signatures for diversity in Europe'. The Commission failed to comply with its obligation to state reasons by not indicating which of the measures among those set out in the annex to the proposed initiative did not come within its competence and by not setting out the reasons in support of that conclusion.

Eurozone

Case T-749/15 *Nausicaa Anadyomène SAS and Banque d'escompte v ECB*

- The European Central Bank (ECB) is not bound to make good the loss allegedly sustained in 2012 by commercial banks holding Greek debt instruments in connection with the restructuring of Greek debt. The ECB committed no unlawful act in implementing its scheme for the exchange of Greek debt instruments.

Sanctions

Case T-577/14 *Joint-Stock Company 'Almaz-Antey' Air and Space Defence Corp. v Council*

- The General Court upheld the freezing of funds of the Russian company Almaz-Antey.

Social security

Case C-430/15 *Secretary of State for Work and Pensions v Tolley*

- EU law prevents a Member State from making retention of a sickness benefit subject to a residence condition. However, a person can only benefit from the right to receive such benefits after transferring his residence to another Member State if he has obtained prior authorisation for that purpose.

Advocate General Opinion

Case C-638/16 PPU *X and X v État Belge* by Advocate General Mengozzi

- Member States must issue a visa on humanitarian grounds where substantial grounds have been shown for believing that a refusal would place persons seeking international protection at risk of torture or inhuman or degrading treatment. It is irrelevant whether or not there are ties between the person concerned and the requested Member State.

Upcoming decisions and Advocate General opinions in February

Asylum law

Case C-560/14 *MM v Minister for Justice and Equality, Ireland and the Attorney General* to be decided on 9 February

Question referred by the Irish court:

- Does the "right to be heard" in EU law require that an applicant for subsidiary protection, made pursuant to Council Directive 2004/83/EC, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, be accorded an oral hearing of that application, including the right to call or cross-examine witnesses, when the application is made in circumstances where the Member State concerned operates two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection, respectively?

Case C-578/16 *C. K., H. F., A. S. v Republic of Slovenia* Opinion of Advocate General Tanchev on 9 February

Questions referred by the Slovenian court:

- Is the interpretation of the rules relating to the application of the discretionary clause under Article 17(1) of the Dublin III Regulation, having regard to the nature of that provision, ultimately a matter for the courts and tribunals of the Member State, and do those rules release the courts and tribunals against whose decisions there is no judicial remedy from the obligation to refer the case to the Court of Justice under the third paragraph of Article 267 of the TFEU?
- In the alternative, if the answer to the above question is in the negative, is the assessment of circumstances under Article 3(2) of the Dublin III Regulation (in a case such as the one forming the subject matter of the present reference for a preliminary ruling) sufficient to satisfy the requirements of Article 4 and Article 19(2) of the Charter of Fundamental Rights of the EU, in conjunction with Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 33 of the Geneva Convention?
- Does it follow from the interpretation of Article 17(1) of the Dublin III Regulation that the application of the discretionary clause by the Member State is mandatory for the

purposes of ensuring effective protection against an infringement of the rights under Article 4 of the Charter of Fundamental Rights of the EU in cases such as the one forming the subject matter of the present reference for a preliminary ruling, and that such application prohibits the transfer of the applicant for international protection to a competent Member State which has accepted its competence in accordance with that regulation?

- If so, can the discretionary clause under Article 17(1) of the Dublin III Regulation be used as a basis permitting an applicant for international protection, or another person, in a transfer procedure under that regulation, to make a claim that that provision should be applied, which the competent authorities and courts and tribunals of the Member State must assess, or are those administrative authorities and courts and tribunals required to establish the circumstances cited of their own motion?

Civil justice

Case C-75/16 *Livio Menini and Maria Antonia Rampanelli v Banco Popolare — Società Cooperativa* Opinion of Advocate General Saugmandsgaard Øe to be given on 16 February

Questions referred by the Italian court:

- In so far as it provides that Directive 2013/11, on alternative dispute resolution for consumer disputes, 'shall be without prejudice to Directive 2008/52', on certain aspects of mediation in civil and commercial matters, must Article 3(2) of Directive 2013/11 be construed as meaning that it is without prejudice to the possibility for individual Member States of providing for compulsory mediation solely in those cases which do not fall within the scope of Directive 2013/11, that is to say the cases referred to in Article 2(2) of Directive 2013/11, contractual disputes arising out of contracts other than sales or service contracts, as well as those which do not concern consumers?
- In so far as it guarantees consumers the possibility of submitting complaints against traders to appropriate entities offering alternative dispute resolution procedures, must Article 1 of Directive 2013/11 be interpreted as meaning that it precludes a national rule which requires the use of mediation in one of the disputes referred to in Article 2(1) of Directive 2013/11 as a precondition for the bringing of legal proceedings by the consumer, and, in any event, as precluding a national rule that requires a consumer taking part in mediation relating to one of the abovementioned disputes to be assisted by a lawyer and to bear the related costs, and allows a party not to participate in mediation only on valid grounds?

Commercial law

Case C-555/14 *IOS Finance EFC SA v Servicio Murciano de Salud* to be decided on 16 February

Questions referred by the Spanish court:

- Regard being had to Articles 4(1), 6 and 7(2) and (3) of Directive 2011/7/EU on combating late payment in commercial transactions, must Article 7(2) of the directive be interpreted as meaning that a Member State may not make recovery of the principal debt conditional on the waiver of the right to interest for late payment?
- Must Article 7(3) of the directive be interpreted as meaning that a Member State may not make recovery of the principal debt conditional on the waiver of the right to compensation for recovery costs?
- Should the answer to those two questions be in the affirmative, where the debtor is a contracting authority, can it rely on the freedom of contract of the parties in order to avoid its obligation to pay interest for late payment and compensation for recovery costs?

Consumer law

Case C-562/15 *Carrefour Hypermarchés SAS v ITM Alimentaire Internationale SASU* to be decided 8 February

Questions referred by the French court:

- Must Article 4(a) and (c) of Directive 2006/114/EC, concerning misleading and comparative advertising, which provides that '[c]omparative advertising shall ... be permitted when ... it is not misleading [and] it objectively compares one or more material, relevant, verifiable and representative features of those goods and services'

be interpreted as meaning that a comparison of the price of goods sold by retail outlets is permitted only if the goods are sold in shops having the same format or of the same size?

- Does the fact that the shops whose prices are compared are of different sizes and formats constitute material information within the meaning of Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market, that must necessarily be brought to the knowledge of the consumer?
- If so, to what degree and/or via what medium must that information be disseminated to the consumer?

Case C-503/15 *Ramón Margarit Panicello v Pilar Hernández Martínez* to be decided on 16 February

Questions referred by the Spanish court:

- Are Articles 34, 35, 207(2), 207(3) and 207(4) of Law 1/2000 on Civil Procedure, which govern the administrative procedure for recovery of unpaid fees ('jura de cuentas'), incompatible with Article 47 of the Charter of Fundamental Rights of the EU in that they preclude the possibility of judicial review? If that is the case:
- In the context of the procedure provided for in Articles 34 and 35 of Law 1/2000, is a Secretario Judicial a 'court or tribunal' for the purposes of Article 267 TFEU?
- Are Articles 34 and 35 of Law 1/2000 incompatible with Articles 6(1) and 7(2) of Directive 93/13/EEC and Articles 6(1)(d), 11 and 12 of Directive 2005/29/EC 3 inasmuch as they preclude any examination ex officio of possible unfair terms or unfair commercial practices in contracts concluded between lawyers and natural persons who are acting for purposes which are outside their trade, business or profession?
- Are Articles 34 and 35 of Law 1/2000 incompatible with Articles 6(1) and 7(2) of, and point 1(q) of the Annex to, Directive 93/13/EEC inasmuch as they preclude the production of evidence for the purpose of resolving the dispute in the administrative procedure for recovery of unpaid fees?

Criminal law

Case C-579/15 *Openbaar Ministerie v Daniel Adam Poplawski* Opinion of Advocate General Bot to be given on 15 February

Questions referred by the Dutch court:

- May a Member State transpose Article 4(6) of Framework Decision 2002/584/JHA, on the European arrest warrant and the surrender procedures between Member States, in its national law in such a way that: its executing judicial authority is, without more, obliged to refuse surrender, for purposes of executing a sentence, of a national or resident of the executing Member State; by operation of law, that refusal gives rise to the willingness to take over the execution of the custodial sentence imposed on the national or resident; but the decision to take over execution of the sentence is taken only after refusal of surrender for purposes of executing the sentence, and a positive decision is dependent on a basis for the decision in a treaty or convention which is in force between the issuing Member State and the executing Member State, the conditions set by that treaty or convention, and the cooperation of the issuing Member State by, for example, making a request to that effect, with the result that there is a risk that, following refusal of surrender for purposes of executing the sentence, the executing Member State cannot take over execution of that sentence, while that risk does not affect the obligation to refuse surrender for purposes of executing the sentence?
- If not, can the national courts apply the provisions of Framework Decision 2002/584/JHA directly even though, under Article 9 of Protocol (No 36) on transitional provisions, the legal effects of that Framework Decision are preserved after the entry into force of the Treaty of Lisbon until that Framework Decision is repealed, annulled or amended?
- If so, is Article 4(6) of Framework Decision 2002/584/JHA sufficiently precise and unconditional to be applied by the national courts?
- If the answers to first and third questions are in the negative, may a Member State whose national law requires that the taking-over of the execution of the foreign custodial sentence must be based on an appropriate treaty or convention transpose Article 4(6) of Framework Decision 2002/584/JHA in its national law in such a way that Article 4(6) of Framework Decision 2002/584/JHA itself provides the required conventional basis, in order to avoid the risk of impunity associated with the national requirement of a conventional basis?

- If the answers to first and third questions are in the negative, may a Member State transpose Article 4(6) of Framework Decision 2002/584/JHA in its national law in such a way that for refusal of surrender for purposes of executing a sentence in respect of a resident of the executing Member State who is a national of another Member State, it sets the condition that the executing Member State must have jurisdiction in respect of the offences cited in the European arrest warrant and that there must be no actual obstacles in the way of a (possible) criminal prosecution in the executing Member State of that resident in respect of those offences (such as the refusal by the issuing Member State to hand over the case-file to the executing Member State), whereas it does not set such a condition for refusal of surrender for purposes of executing a sentence in respect of a national of the executing Member State?

Environment

Case C-129/16 *Túrkevei Tejtermelő Kft. v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség* Opinion of Advocate General Kokott to be given on 16 February

Questions referred by the Hungarian court:

- Do Article 191 TFEU and Directive 2004/35/EC = on environmental liability with regard to the prevention and remedying of environmental damage preclude a provision of national law which, going beyond the 'polluter pays' principle, permits the environmental protection agency to hold specifically the owner of the property liable to pay compensation for the environmental damage caused, without it first being necessary to determine whether there is a causal link between the conduct of that person (a commercial undertaking) and the pollution caused?
- If the first question is to be answered in the negative and, with regard to the air pollution it is not necessary to remedy the environmental damage, may a fine aimed at protecting air quality be imposed on the basis of legislation of the Member State which is more stringent than Article 16 of Directive 2004/35/EC and Article 193 TFEU, or can that more stringent legislation not, at any rate, result in the imposition of a fine which is solely punitive in nature on the owner of the property, which is not responsible for the pollution caused?

Free movement of capital

Case C-317/15 *X, Staatssecretaris van Financiën* to be decided on 15 February

Questions referred by the Dutch court:

- Does the respect for the application to third countries of restrictions, as provided for in Article 64(1) TFEU, extend also to the application of restrictions existing under national rules, such as the extended recovery period at issue in the case in the main proceedings, which rules can also be applied in situations that have nothing to do with direct investment, the provision of financial services or the admission of securities to capital markets?
- Does the respect for the application of restrictions relating to the movement of capital involving the provision of financial services, as provided for in Article 64(1) TFEU, concern also restrictions that, like the extended recovery period at issue in the case in the main proceedings, are not directed at the provider of the services and do not determine either the conditions or the mechanisms of the provision of services?
- Does a situation such as that in the case in the main proceedings, in which a resident of a Member State has opened a (securities) account with a banking institution outside the EU, also come within the definition of 'the movement of capital ... involving ... the provision of financial services' within the meaning of Article 64(1) TFEU, and does it matter in this connection whether (and if so, to what extent) that banking institution carries out activities for the benefit of the account holder?

Free movement of workers

Case C-283/15 *X; other party: Staatssecretaris van Financiën* to be decided on 9 February

Questions referred by the Dutch court:

- Must the provisions of the TFEU relating to free movement be interpreted as precluding national legislation under which a EU citizen who resides in Spain and whose work-related income is taxed in the amount of approximately 60% by the Netherlands and approximately 40% by Switzerland may not deduct his negative income incurred in respect of his property in Spain, which is for his personal use, from his work-related

income which is taxed in the Netherlands, even if he receives such a low income in Spain, as his State of residence, that the abovementioned negative income in the year in question could not have led to tax relief in the State of residence?

- If so, must every Member State in which the EU citizen earns part of his income then take into account the full amount of the abovementioned negative income? Or does that obligation apply to only one of the States concerned in which work is carried out, and if so, to which? Or must each of the States in which work is carried out (not being the State of residence) allow part of that negative income to be deducted? In the latter case, how is that deductible part to be determined?
- In this regard, is the Member State in which the work is actually performed the decisive factor, or is the decisive factor which Member State has the power to tax the income earned thereby?
- Would the answer to the two questions above be different if one of the States in which the EU citizen earns his income is Switzerland, which is not a Member State of the EU also does not belong to the EEA?
- To what extent is it significant in this regard whether the legislation of the taxpayer's country of residence (in this case, Spain) makes provision for the possibility of deducting mortgage interest relating to the taxpayer's property and the possibility of offsetting the tax losses arising there from in the year in question against possible income earned in that country in later years?

Freedom to provide services

Case C-99/16 *Jean-Philippe Lahorgue v Ordre des avocats du barreau de Lyon, Conseil national des barreaux 'CNB', Conseil des barreaux européens 'CCBE', Ordre des avocats du barreau de Luxembourg* Opinion of Advocate General Wathelet on 9 February

Questions referred by the French court:

- Is the refusal to issue a secure router for accessing the Private Virtual Network for Lawyers to a lawyer duly registered at the Bar of a Member State in which he wishes to practise his profession as a free provider of services contrary to Article 4 of Directive 77/249/EC, facilitating the effective exercise by lawyers of freedom to provide services, on the basis that it constitutes a discriminatory measure which could impede the practice of his profession as a free provider of services?

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The Law Society of England & Wales set up the Brussels office in 1991 in order to represent the interests of the solicitors' profession to EU decision-makers and to provide advice and information to solicitors on EU issues. In 1994 the Law Society of Scotland joined the office and in 2000, the Law Society of Northern Ireland joined. The office follows a wide range of EU issues which affect both how solicitors operate in practice and the advice which they give to their clients. For further details on any aspect of our work or for general enquiries, please contact us: brussels@lawsociety.org.uk

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